STATE OF MICHIGAN

ORIGINAL

IN THE SUPREME COURT

GLENN S. MORRIS,

Plaintiff/Appellee,

v.

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C., a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, LLC,

Defendant/Appellant.

Supreme Court Nos. 149631 - 149633

Court of Appeals Case Nos. 315742/315007

Circuit Court Case No. 09-001878-CB

Circuit Judge Christopher P. Yates

149631-3

MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC,

Plaintiff/Appellee,

v.

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C., a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, LLC,

Defendant/Appellant.

Supreme Court Nos. 149631 - 149633

Court of Appeals Case No. 315702

Circuit Court Case No. 09-011842-CB

Circuit Judge Christopher P. Yates

APPELLANT NEW YORK PRIVATE INSURANCE AGENCY, LLC'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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APPELLANT NEW YORK PRIVATE INSURANCE AGENCY, LLC'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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Appellees in their opposition brief take a great deal of liberty with their characterization of the facts. However, when one actually reviews the citations and the facts upon which Appellees claim support their "allegations", it is easily ascertained that the "argument" of Appellees' counsel must be separated from the record before this Court. What is undisputed is as follows:

1. In the cases here on appeal (Case Nos. 09-011842-CB and 09-001878-CB),[1] the Circuit Court dismissed with prejudice on motions for summary disposition all causes of action against NYPIA, including those claims brought under the UFTA (Exs. 5-8 to NYPIA's Opening Brief).

2. Appellees did not appeal the Circuit Court's granting of summary disposition in favor of NYPIA with respect to Count I of the Morris and MSG Properties Actions seeking recovery against NYPIA under the UFTA.

3. Subsequent to the granting of the motions for summary disposition, NYPIA was never joined as a party to the Morris and MSG Properties Actions. Nor did Appellees ever motion to add NYPIA as a party under MCR 2.205(A).

4. The Morris and MSG Properties Actions were not consolidated with the Dissolution Action pursuant to which the Court held a hearing on the Contempt Motion brought by Appellees and which the Court later rejected with respect to NYPIA.

5. NYPIA did not conduct discovery in the Morris and MSG Properties Actions as they were dismissed on motions for summary disposition in 2009 and early 2010. NYPIA was only the subject of discovery by Appellees in those actions.

6. The only claim that was tried by the Circuit Court at the trial in the 2009 actions was a single claim of fraudulent transfer brought by Appellees against MSG and its law firm, Charron & Hanisch. This was the sole claim tried by the Circuit Court in the Morris and MSG Properties Actions.

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[1] Referred to as the Morris Action and the MSG Properties Action in NYPIA's Application for Leave to Appeal ("Application"). The references utilized in the Application will be used in this Reply.

7. The Circuit Court dismissed the Contempt Motion brought by Appellees against NYPIA in the 2007 action, finding no wrongdoing and in its Verdict found no collusive activities.

8. The Circuit Court in December 2012 entered judgment against NYPIA in the 2009 actions, though not a party to the actions, finding that NYPIA's acceptance of the secured creditors' offer to sell the assets for the outstanding debt of $645,000 was not for "reasonable equivalent value" and, therefore, that the Circuit Court had authority to enter judgment against NYPIA under the UFTA as a purchaser of the assets pursuant to an Article 9 sale.

9. The Circuit Court never addressed the sale under Article 9, MCL 440.9101, et al., including the different standards set forth for a secured party's right to accept collateral for the discharge of the obligation and to dispose of the collateral after the debtor's default, see e.g. MCL 440.9504-5. However, these issues were never addressed because NYPIA was no longer a party to the 2009 actions.[2]

It is also worth noting that the record is devoid of facts to support the conjecture by Appellees that NYPIA participated in any course of action to defraud or otherwise "screw" Appellees out of anything. Appellees sole cited support is to a letter, taken out of context, by someone unrelated to NYPIA from 2006 that in no way involved the November 2008 Article 9 sale by the secured creditors of MSG (see Appellees' Opposition Br. p. 6, fn. 7). Nor was there any "council" out of which any plan was borne. Rather, the testimony cited only bears that there was a meeting for a financial review of MSG in 2007 prior to the Dissolution Action and, thus, prior to the October 2007 Order in which the Court ordered the forced sale of Morris' interest in MSG.[3]

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[2] Nor did NYPIA have the ability to raise other defenses to the UFTA action as those claims had been dismissed on summary judgment in 2009.

[3] In other words, there could not have been any "scheme" discussed as the meeting occurred prior to the order mandating the purchase of Morris' interest and, therefore, before any debt was incurred by Schnoor to Morris. Notably, at no time was MSG actually a debtor to Morris as it was Schnoor who owed Morris for the purchase of his stock. It should be further noted that Appellees take great liberty in trying to associate actions taken by a "council", but the

Next, it is also important to note that the Court of Appeals made certain conclusory comments in dicta not cited to any factual record. For example, the Court indicated that NYPIA appeared or participated in the trial. However, it is undisputed that NYPIA's appearance was for the sole purpose of defending the Contempt Motion. It is important to review the June 3, 2011 hearing transcript (another copy is attached hereto as Ex. 15 for ease of reference). The hearing addressed a discovery request by Appellees to NYPIA shortly before the hearing on the Contempt Motion commenced. At the hearing, Mr. Gerling, on behalf of NYPIA, and the Court engaged in the following discussion:

> Mr. Gerling: Here is the position we're in, your Honor, essentially. This is the first substance we've heard of any procedural outline on how the – how the search was going to be conducted.[4] I don't know if we're in or out of this case, given the recent order that was issued last week [the Order to Show Cause on Appellees' Motion for Contempt]. But we certainly were not participants in any meaningful manner and the discovery phase has gone on far too long.
>
> The Court: Well you're not –
>
> Mr. Gerling: All of this came up –
>
> The Court: You're not in the 09 case. You're not in the 09 cases.
>
> * * *
>
> The Court: And that's fine. I'll be glad to take that all up. Look, I, by issuing an order to show cause, I was not saying that it's a fait accompli. We went through a whole long contempt hearing with

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underlying citations do not support any involvement by NYPIA. In short, the actions alleged by Appellees are not supported by the citations and the loose allegations attributed to a "council" or to a "plan" are simply not supported by the facts. They are merely arguments by Appellees' counsel.

[4] The request was for a search of NYPIA's hard drives and server. The search was conducted but no documents were uncovered that supported the Contempt Motion against NYPIA.

> regard to Mr. Schnoor, and then I didn't find him in contempt after all of that. So I don't want anyone to think that I've made my mind up about anything. It's just simply that based upon the preliminary showing made by Mr. Stek, I was satisfied that there was enough there so I should haul everyone in here and try to figure out what's going on.
>
> Now, if you want my honest opinion on it, I think, frankly, that the contempt proceeding, given the remedy that I found that the Court of Appeals imposed in a published opinion, I don't even understand why the 2009 cases even have to hang around anymore, because Mr. Stek can get all the relief he wants in the 2007 case based upon a contempt finding. If I had my druthers, he'd dismiss the 2009 cases and we'd just go on that and that alone, and then anybody who's left is, and anybody who can't be held in contempt is out. And it may be that New York Private is out. I mean I've already taken you out of the 2009 cases. [Ex. 15, June 3, 2011 hearing, pp. 11, 39-40].

The Court went on at the end of the hearing to make the resounding statement:

> Mr. Gerling: And the court to show cause relates to the 07 case?
>
> The Court: Correct. Right. You're out of the 2009 case for once, for all, and forever.
>
> Mr. Gerling: All right.
>
> The Court: Okay? Now –
>
> Mr. Gerling: Thank you. [Ex. 15, June 3, 2011 hearing, p. 42].

There is absolutely no evidence that NYPIA or its counsel appeared in the 2009 trial. Nor were the 2007 and 2009 actions consolidated. Rather, it was made clear to NYPIA and its counsel that were appearing solely in the Contempt Motion filed in the 2007 Dissolution Action. In addition, it is also clear that NYPIA appeared at a discovery motion hearing in the 2009 cases, but only as a third party against whom discovery was directed. NYPIA did not conduct discovery of its own in the 2009 cases as it was dismissed from those cases at their onset. This is also undisputed from the record.

A. THE COURT DEPRIVED NYPIA OF DUE PROCESS BY ENTERING JUDGMENT AGAINST IT IN A CASE TO WHICH IT WAS NO LONGER A PARTY AS THE CLAIMS AGAINST IT ALREADY HAD BEEN DISMISSED WITH PREJUDICE

First, it is noteworthy that the Court of Appeals ruling in this case is directly contrary to the holdings of other panels of the Court. For example, in *Conley v Price WaterhouseCoopers LLP*, No 276318 (Mich App, March 18, 2008) (a copy is attached hereto as Ex. 16), the Court of Appeals held that the defendant had been denied due process when the court entered a judgment against the defendant on a claim that was not pending against the defendant. In *Conley*, there were other claims pending against the defendant, but not the claim on which the court entered judgment. Still, the court found that the defendant was denied due process when the court entered judgment on a claim that was not pending against the defendant.

In this case, the facts are much more egregious. Not only was there no cause of action pending against NYPIA, NYPIA was not even a party to the actions and the claims on which judgment was entered were dismissed over eighteen months earlier on summary disposition. Moreover, Appellees fail to distinguish *Teamsters v Gen Cty Bd of Cmm'rs*, 401 Mich 408; 258 NW2d 55 (1977), in which the Court of Appeals held that the circuit court improperly entered judgment against the defendant on claims that had been previously dismissed on summary disposition. In short, the Court of Appeals' decision in this matter is clearly contrary to existing precedent in Michigan.[5]

1. The Circuit Court's Judgments Against NYPIA Violate Due Process

The case on which Appellees rely, *Hicks v Ottewell*, 174 Mich App 750 (1989), involves fact wholly different from those present here. In *Hicks*, the defendant was a present defendant in

[5] See also the other contrary Michigan precedent set forth in NYPIA's Application.

the case against whom claims were pending, and the order at issue in the appeal was one of sanctions imposed against the defendant in the litigation pending against it.

Here, not only did the Circuit Court clarify at the June 3, 2011, pre-hearing that NYPIA would be participating in a proceeding only in connection with the Order to Show Cause on Appellees' Motion for Contempt (see *supra*), but at the commencement of the proceedings three weeks later stated as follows:

> Mr. Gerling: David Gerling appearing on behalf of non-party New Private Insurance Agency, I believe, in the '07 case, no involvement in the two '09 proceedings.
>
> The Court: Correct. Right. Summary dispositions been granted in favor of your client and all claims in both of the 2009 cases, so far as I can tell, you have no role to play in the 2009 cases. Your client is at no risk of liability. [Ex. 9 to NYPIA's Opening Brief, Transcript of June 28, 2011 Proceedings, pp. 7-8.]

Thus, prior to the hearing on the Contempt Motion, the Court made it clear that the causes of action against NYPIA had been dismissed against it on motion and with prejudice. However, it was only when the Court entered its Verdict on December 27, 2012, that it advised NYPIA that judgments were being entered against it on the UFTA claims that had been previously dismissed with prejudice by the Court in November 2009.

2. NYPIA's Motion for Reconsideration Did Not "Cure" the Due Process Violations

Appellees fail to explain how a Motion for Reconsideration filed in 2013 after receipt of the December 27, 2012, Verdict in any way "cured" the due process failures of entering judgment against NYPIA in cases in which it was not a party and on claims against it that had been dismissed with prejudice in November 2009. Nor did the Court explain how the fundamental due process violations were "cured". Such a cursory argument, both by Appellees

and the Court, that a filing of a Motion for Reconsideration somehow "cured" the constitutional due process deficiencies that occurred in this matter is unavailing.[6]

3. The Circuit Court Granted Summary Disposition in Favor of NYPIA, and Therefore Could Not Subsequently Enter Judgments Against NYPIA

Appellees offer no genuine attempt to distinguish *Teamsters v Gen Cty Bd of Cmm'rs*, 401 Mich 408; 258 NW2d 55 (1977), in which the Court of Appeals held it clear error to enter judgment against the defendants on a claim that had been previously dismissed on summary disposition. Appellees' attempt in footnote 40 to distinguish *Teamsters* is misplaced. In this case (being the 2009 actions), like in *Teamsters*, all claims against a defendant against whom judgments were later entered previously had been dismissed as a party, and such claims against the defendant had been dismissed as well in connection with summary disposition motions. The *Teamsters* case is indistinguishable and is on point.

4. The Circuit Court Lacked Authority to Enter Judgment Against Non-Party NYPIA

Once again, Appellees make no attempt to distinguish *Estes v Titus*, 273 Mich App 356; 731 NW2d 119 (2006), in which the Court of Appeals held that joinder of a non-party transferee is "necessary to accord [the transferee] due process while litigating her and plaintiff's claims to the disputed property." It is also without merit, and unsupported by any precedent, to claim that such due process rights are "waived" by a non-party who does not make a pre-trial motion to object to its "non-party status" when it is not a party to the action. If such a ruling of law were

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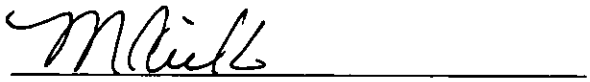
[6] Again, Appellees quote to the Circuit Court's statements concerning discovery deadlines, but fail to advise this Court that such discovery deadlines did not involve NYPIA and that NYPIA was not involved in proceedings concerning same. In addition, it is undisputed that NYPIA conducted no discovery of its own. How could it, since it was no longer a party to the actions and had no rights as a non-party to conduct discovery in a case pending between other parties. Such statements are grossly misleading by Appellees.

left to stand, it would create egregious precedent in this state. Rather, it is the parties to the pending action who can motion pursuant to MCR 2.205 to join a party. Appellees failed to make such a motion.

CONCLUSION

For all of the reasons set forth above , this Court should reverse the Opinion of the Court of Appeals, and vacate the Judgments against NYPIA issued by the Circuit Court in the Morris and MSG Properties' Actions. In addition, there would be no basis to remand the actions, as Appellees did not appeal the Circuit Court's granting of summary disposition in favor of NYPIA and dismissing of Counts I (which sought relief under the UFTA) in the Morris and MSG Properties Actions.

FOLEY & LARDNER LLP



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